IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. H. STANTON,
Plaintiff in Error,
vs.
J. L. HAMILTON,
Defendant in Error.

No. 3538

Error to the United States District Court for the Eastern District of Washington

REPLY BRIEF OF PLAINTIFF IN ERROR

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EMPIRE-PACIFIC PRINTING CO., SPOKANE

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ARGUMENT.

Since the questions involved, which we will discuss in this brief, are identical in the two cases, Nos. 3537 and 3538, we will confine ourselves to the filing of brief in the Hamilton case. We will consider the suggestions made by Defendant in Error in their order.

It is stated (Brief 4): "Early in 1917 Stanton gave Wilson & Co. an option on his stock for $200 a share, which option was not exercised." We failed to refer to this fact in the opening brief, and it has some bearing, since, from this, it appears that Stanton was willing to sell for $200 a share up to the time the option was given on May 8, 1917, but the packers, Wilson & Co., did not desire to exercise such option.

It is said (Brief 5) that Stanton's "conclusion was that they ought by all means, to sell the stock and that he would take $150 a share for his stock if he could not do any better." Stanton never pursued any other course than one consistent with a desire to sell. He was, however, as was natural, endeavoring to get the best price possible.

It is said (Brief 7), that this excess which Stanton received over $200 a share amounted exactly to $20 a share on the stock Stanton, Hamilton and

Hample. This is conceded, but it proves absolutely nothing, except that the parties used that method of determining what would be paid Stanton for the three additional agreements. Why this method was used was explained by the witnesses Robbins, O'Hern, Kizer and Stanton, and there is nothing inconsistent or unreasonable in the explanation nor any evidence to the contrary.

It is said (Brief 7), "the conclusion is irresistible that Stanton sold his own stock at the price stated in the option, $220 a share, and then procured to be added to it $20 a share on the Hamilton and Hample stock." Why such a conclusion is irresistible, is not explained. The conclusion, however, we submit is irresistible, even if there was not such an overwhelming uncontradicted evidence on that point, that Armour & Co. was buying, in addition to Stanton's stock, his agreement not to enter into business, his guarantee of the accounts, and his agreement to assist in the business and that the consideration for these agreements constituted the excess of $92,266.67 over $200 a share.

It is said (Brief 8) that Armour & Co. also agreed to purchase from Stanton within four months any stock he might acquire from other stockholders at $220 a share. This simply shows, what was stated in our opening brief, that Armour & Co. finally was willing to pay for a majority, or all of the stock, together with the three personal

agreements from Stanton, a sum which would be produced by multiplying the total number of shares acquired by $220. Nothing else can be gathered from the evidence. The three additional agreements were Stanton's, and the payment therefor belonged to Stanton, and neither Hample, Hamilton nor any other stockholder had any interest therein.

It is said (Brief 8) "the evidence is overwhelming that the pretense that the sum over $200 a share that was paid him for his stock was paid for these incidental agreements is the veriest sham. In any event it was obviously a question for the jury upon the direct testimony and the inferences reasonable to be drawn from all the evidence as to the true nature of the transaction between Stanton and Armour & Co." Assertions are not proof, and there is at this place in the brief no attempt made to sustain these assertions. We shall now proceed to show that the only attempt at any place in the brief to support these assertions did not reach the point, or purport to reach the point, and that there is scarcely an attempt to support the claim that a sum in excess of $200 a share was paid for the stock. The only discussion on this point is found in Defendant in Error's brief at pages 12 to 34, inclusive, and we invite the court's careful consideration to these pages.

It is first said (Brief 12) that "Stanton's trial counsel took the view that there was evidence to

take the case against him to the jury." The fact that Plaintiff in Error's trial counsel did not make a motion for non-suit, can not put into the record evidence that is not there; nor can it make a case for the jury if in fact there was no such evidence. The most that can be said is that Stanton's trial counsel had failed to analyze the evidence, due to the hurry attending the trial.

Next is a suggestion (Brief 12) that counsel for Stanton requested instruction on the theory of the claim made by the complaint. This was no confession of anything; it was simply construing the complaint.

Next, it is suggested (Brief 13) that the sufficiency of the evidence can not be raised now, because there was no motion for non-suit. This suggestion has nothing to do with the determination of the question whether there was or was not evidence to establish that a sum in excess of $200 a share was paid for the stock. It may be that counsel for Stanton should have made a request for a peremptory instruction, but their failure to do so would not change the evidence that is before the court. However, on the necessity for a requested peremptory instruction, we submit that the ultimate end in the trial of a law suit is to see that justice is done, and it would seem hardly possible that a judgment would be permitted to stand where it is plain that no right of action existed. How-

ever, a decision on the questions raised in this case does not rest upon the fact that there is no evidence to sustain the verdict.

It is further said (Brief 17) Hample and Hamilton both testified that Stanton urged them to leave to him the negotiations for selling all their stock to Armour & Co., saying that "he would drive as hard a bargain with Armour & Co. as he could, would not sell his stock unless he also sold theirs, and that they should receive the same price for their stock that he received for his." It is true that there is such evidence, but it has no bearing on the question as to whether more than $200 was received for the stock. If there was nothing in excess of $200 received for the stock, then Stanton violated no agreement with Hample and Hamilton and wronged them in no manner, and it is not contended that he did not attempt to drive as good a bargain as possible. In driving such bargain, however, there was no duty on the part of Stanton to contribute his own individual property and rights for the purpose of swelling the purchase price of the stock.

It is next suggested (Brief 17) "it is equally manifest that the question whether Stanton was paid $220 a share for his stock plus $20 a share on the Hample and Hamilton stock" was for the jury. It is said that it is a remarkable coincident that this additional amount received by Stanton

over $200 a share was exactly $20 a share for the stock of Stanton, Hample and Hamilton. Even if it was remarkable, there would be nothing in that circumstance alone to show that this additional amount was paid for the stock, and especially when the written contract between Armour & Co. and Stanton was introduced in evidence and shows that the $576,400 was paid for Stanton's stock and these three additional agreements. The evidence as to why this method was used is uncontradicted, and we must submit that there is nothing unreasonable in it. In other words, if the amount paid for these additional agreements had been an even $100,000, then, according to Defendant in Error's position, they would have no standing in court, but since the amount happened to be $92,266.67, which amount could be produced by multiplying the number of shares of Stanton, Hample and Hamilton by $20 that it thereupon made a case. The proposition, of course, is absurd.

It is said (Brief 19), "true, he says that after they had examined it, they said they would not take it at $220 a share, but the fact that they did pay that and more for the stock proves that he prevaricated in that as he did in so many other things during the progress of the trial." This statement, of course, is without any foundation, as there is no evidence that Armour & Co. did take the stock at $220 a share, but these agreements to retire from business, the guarantee of accounts

and agreement to assist in the business were necessary in order to obtain the price that was paid by Armour & Co.

The suggestions (Brief 20) about what took place when Stanton was at Butte have no bearing whatsoever upon the price paid by Armour & Co. for the stock. Stanton may have been pessimistic about the value, and he may have been over-anxious to sell, but there is no contention that he did not drive as hard a bargain as he could in making the sale. He violated no duty to Hample and Hamilton.

The suggestion (Brief 21) that Armour & Co. agreed to pay $220 a share for any additional stock which Stanton might secure is entirely in harmony with our contention that Armour & Co. finally were willing to pay for a majority, or all, of this stock, together with the three agreements from Stanton, an amount produced by multiplying the number of shares acquired by $220.

The above, we believe, comprises the sum total of the arguments of Defendant in Error for the purpose of establishing that a price in excess of $200 a share was paid for the stock. We submit that such argument is not only weak, but that it does not attempt to go to the point, and the suggestions made have no bearing on the question whatever, and that counsel for Defendant in Error knew absolutely that the arguments advanced were not

sound and could not stand. It is pertinent to observe that it has not been pointed out how Stanton was compensated for his agreement to retire from business, his guarantee of the accounts on which he had paid $22,534 and his assistance in the business for one year, unless this $92,266.67 belonged to him, nor has there been any attempt to suggest any reason why Hample and Hamilton should be the beneficiaries of these agreements.

It is suggested (Brief 27) that the trial court did not err in instructing the jury that the amount of recovery was $20 a share if they found in favor of Defendant in Error, and in not allowing any deduction on account of the commission payable to Grinnell, because Grinnell did not perform his contract in that Armour & Co. would not pay cash. However, there is no force in this suggestion, as the evidence conclusively shows that Stanton, Hample and Hamilton all waived the payment of cash, and, under such conditions, the agent is still entitled to his commission. Further, it is suggested that the court had a right to eliminate the question of commission because Stanton's contention is that but $200 a share was paid for the stock. If Stanton's contention was not sustained in this respect, this would not give Defendant in Error a right to recover more than in "equity and good conscience" he was entitled to receive.

It is further suggested (Brief 28) that, at the

request of Stanton's counsel, the court instructed the jury that the option feature of the agreement with Grinnell was unenforceable. This instruction related only to the option feature; it had nothing to do with the other provision in the agreement that a commission was to be paid if a sale was made.

It is said (Brief 28) that "there is not an atom of evidence that Stanton waived the terms of purchase stated in the Grinnell option." The evidence on this point, however, is absolute that Stanton dealt with the purchasers procured by Grinnell, and agreed with them to accept payment in the manner shown by the contract.

It is said (Brief 30) that if this instruction was erroneous, "it was the duty of counsel to request an instruction concerning that view." It was not a question of the trial court giving additional instructions about which complaint is made. The error was that the instruction given was erroneous and required the jury to return a verdict of $20 a share, when, if there was anything for them to consider at all, the amount of the verdict should be less, or, in any event, the jury should have been permitted, under the "equity and good conscience" rule, to determine the amount. For the court to have given any other instruction on the subject which would correct the error, it would have been necessary to withdraw the instruction already given.

It is suggested (Brief 31) that Hample and Hamilton testified that Stanton agreed himself to take care of Grinnell's commission. This testimony, however. was contradicted by Stanton, and it was therefore, in any event, a question for the jury, but even with this evidence of Hample and Hamilton, if there was such an agreement, it related to a sale being made at $200 a share, and had nothing to do with the situation now existing when Defendant in Error is claiming a right to repudiate that sale and to recover on basis of a sale at $220 a share.

The authorities cited at pages 32, 33, 34 and 35 of the brief have no bearing whatsoever upon the error in this instruction. As suggested before, the criticism of the instruction is not that it was not sufficiently full, but that it was a positive statement that Defendant in Error was entitled to recover a certain amount, when, under the law, if a recovery could be had it would be a lesser amount. Amplification of the instruction could not cure the error; it could only be cured by the withdrawal of such erroneous instruction.

With reference to these three additional agreements on the part of Stanton and the right, assuming Defendant in Error was entitled to recover, of the jury to take such facts into consideration under the "equity and good conscience" rule, and the instruction by the court that the amount of recovery

should be $20 a share, Defendant in Error again urges that the objection is not open, because counsel for Stanton should have requested additional instruction (Brief 36). But the situation here was exactly the same as with reference to the Grinnell commission. Additional instructions would not cure the error; it could only be cured by withdrawal of the erroneous instruction.

Further, at the same page, it is urged that counsel for Stanton should have pleaded these three additional agreements for the purpose of minimizing a recovery. This, however, could not be true, as the question involved was the extent of Stanton's liability, if there was a liability. The evidence introduced by Defendant in Error showed the facts, and any evidence introduced by Stanton was without objection and was properly before the court and jury. In no event, however, would an affirmative pleading be necessary, as the question at issue was what amount, if any, did Stanton receive which in "equity and good conscience" belonged to Defendant in Error. Defendant in Error could claim nothing more.

It is said (Brief 37) that the complaint in this case was strictly for money had and received, and it was not on the theory of both tort and implied contract. It is, however, at once manifest that the complaint clearly states a cause of action in tort, and if this were not true the trial court proceeded

on that theory, as shown by the instruction quoted in Specification of Error 3, and it is perfectly apparent from said instruction that the court submitted the case to the jury on the two theories. Even if the complaint was only for money had and received, the error still exists, since the court submitted the case on the two theories.

It is said (Brief 39), that in Specifications of Error 2, 3 and 4 we have selected "isolated parts of three different instructions." These are not isolated parts, they all deal with an additional theory of recovery submitted by the court, and there is nothing in the instructions as a whole that minimizes, or seeks to minimize, such instructions. As suggested in the opening brief, there are only two possible constructions of this criticised portion:

(1) That if without fraud, breach of agency, or representing Defendant in Error, and without having had anything to do with the sale of Hample and Hamilton's stock, any of the purchase price was paid to Stanton, he was liable.

(2) If Stanton received a commission on the sale of Hample and Hamilton's stock, or had an agreement with Armour & Co. that as to any stock purchased at less than $220 a share, he was to have, and did receive, the difference, he was liable.

As to the first theory, Stanton would not be liable unless the money was paid to him for the use and benefit of Hample and Hamilton, and not

paid to him as his own. There is no suggestion in the evidence that this was done, and, in fact, the whole theory of the case on part of Defendant in Error was that it was not paid on that assumption. The very contract with Stanton shows that it was paid to him as his own.

On the second theory, it, of course, would not be true that Stanton would be liable if the money was paid to him as commission, or under any other character of agreement when he was not representing Hample and Hamilton, made no misrepresentations, did not sell their stock and committed no wrong.

At pages 44 *et seq.* citations of cases having to do with money had and received are made. A discussion of the law of money had and received is of no importance. While this form of action is a liberal one, no cases are to be found permitting a recovery where money is paid to another, and received by such other, as his own, and such other person has violated no duty to anyone. Nor are there any cases that permit a recovery where one has received money without the commission of wrong and under lawful agreement.

It is said (Brief 47), "it is true that if the criticised instructions stood alone, and were not supplemented by the other instructions, they are not so complete as they might have been made, or, probably, as the trial judge would have made them if

he had given no other instructions touching the evidence necessary to sustain the action." However, counsel has not pointed out any instruction given by the trial court which corrected these errors or removed the sting.

It is further suggested (Brief 48) that the instruction was peculiarly sound "if a part of the consideration for the sale of the Hample and Hamilton stock was in fact paid to and retained by Stanton, his relation to them, and his concealment of matters vitally affecting the transaction, were such that he could not in equity and good conscience keep it." Counsel has here forgotten his lines. He has overlooked the fact that in these criticised instructions the trial court has carefully excluded any violation of agency, and any misrepresentations in sale of the stock by Stanton.

It is stated (Brief 49), "it is generally accepted that the mere fact that a person is a director of a corporation imposes no fiducial obligation upon him in dealing with a shareholder concerning the latter's stock." Following this, at various pages of his brief, counsel refers to cases of dealings between an officer of a corporation and stockholder, and seems to intend to claim some advantage by reason thereof. In the first place, counsel is still considering the correctness of the instructions set out in Specifications of Error 2, 3 and 4 and these instructions exclude any dealings on the part of

Stanton for Hample and Hamilton, exclude agency, exclude any sale of their stock and proceed on the theory that they sold their own stock. Second, there is no evidence that the stock was sold for a sum in excess of $200 a share. Third, under the law of the State of Washington, where Stanton & Co. had its existence, and the place where the contract was made, a stockholder dealing with an officer of his corporation is dealing at arm's length, and no relationship of trustee exists between them. *Haverland vs. Lane,* 89 Wash. 557 (154 Pac. 1118.) The decisions of the Supreme Court of the State of Washington are controlling.

It is said (Brief 55) in referring to these instructions and what the jury was told, "that is sound law, although no special circumstances were present." If this was true, which is not, it nevertheless does not reach the point. One of the complaints alleged against these instructions is that, if they stated the law correctly under the theory that if any money was paid to Stanton for the use and benefit, or as the money of, Hample and Hamilton, they could recover, there was no foundation in the evidence for any such instructions, and they were purely abstract, and under the universal authority, were prejudicial error.

It is said (Brief 60), "neither by pleadings, evidence or requested instructions did Stanton make any claim to a commission for getting the Hample

and Hamilton stock for Armour & Co., or admit in the slightest that he made a profit out of the sale of their stock." True, Stanton made no such claim, but if there is a possible theory under the evidence in this case that Stanton profited through the sale of the Hample and Hamilton stock, it must be on the theory of commission, or some other agreement with Armour & Co. There certainly was no evidence that any of the money was paid to Stanton as belonging to or for the use and benefit of Hample and Hamilton. The contract with Armour & Co. was for the payment of the money to Stanton for his stock and his three agreements and for no other purposes.

It is further suggested (Brief 62), "under the evidence, however, if Stanton is to be considered as a broker he must be regarded as a broker for Armour & Co. unknown to Hample and Hamilton, who made use of his influential position in the Stanton Co. to get their stock for Armour & Co. under the guise of acting in their interest." But again, counsel overlooks the point under discussion, and the fact that these instructions exclude the question of agency, and the question of Stanton having anything to do with the sale of the Hample and Hamilton stock. Fraud, agency, misrepresentations, and dealing with the stock have nothing to do with considering these instructions, because it was all excluded by the court.

It is suggested (Brief 74) that counsel for Stanton requested the uncriticised portion of the instruction contained in Specification of Error 3. Quite true, but this instruction was a statement on the theory of the complaint and entirely justified by the complaint, and the theory on which the case was tried, and the trial court so understood the situation as shown by the giving of this instruction.

It is suggested (Brief 75) that the failure of the trial court to embody in these instructions the "equity and good conscience" rule can not now be urged, since counsel for Stanton should have requested additional instructions. But additional instructions which would reach the point could only have the effect of nullifying the instructions already given, if their prejudicial effect was to be removed. There is no rule, however, which requires a litigant to request the trial court to withdraw an erroneous instruction.

It is said (Brief 76) that the repetition of this instruction three times was invited by counsel for Stanton. The court will look in vain for anything supporting this statement. The instructions requested by counsel for Stanton were proper and recognized by the trial court as proper, but the objectionable portion was engrafted on the court's own motion.

With reference to Specification of Error 5, the

instruction dealing alone with the Hamilton case, counsel argues that the criticism of this instruction is the use of the words "new and independent contract." This is not the theory of Plaintiff in Error. The theory of Plaintiff in Error is that it was immaterial whether a new and independent contract was made or not. That Hamilton could not recover if he withdrew his stock from the bank, notified Armour & Co. that, by reason of their failure to perform, and the alleged fraud and misrepresentations of Stanton, the contract was at an end. He could not thereafter proceed to deal with Armour & Co. and turn over his stock and receive pay therefor and still make a claim against Stanton. Hamilton had exercised his election and he could not thereafter as against Stanton change that election; further, he knew absolutely at that time, as shown by his letters, all that he knew at any time afterward, and if a fraud had been committed, he knew of that fact and had a right to rescind. If more than $200 a share was paid for his stock, nobody knew it better than Armour & Co., and Armour & Co. could not defend against rescission.

The authorities cited (Brief 86) on the question of Hamilton's right to withdraw his rescission have no bearing upon the question. Undoubtedly, as between Hamilton and Armour & Co. the rescission could be withdrawn, but these authorities have no

bearing upon the effect of the rescission as to third persons.

In conclusion, we submit there has been nothing advanced by Defendant in Error to sustain the judgment in this case. When Defendant in Error's brief is carefully considered, it will be observed that the questions involved have been avoided and the discussion has been directed largely to questions not involved. There is scarcely an attempt to claim that a recovery on the evidence could properly result. A very large portion of the brief has been directed toward an attempt to show that Stanton's counsel had in some manner waived his rights, and that this court should now find some method of carrying into effect a wrong judgment.

Respectfully submitted,

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